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In The

Supreme Court of the United States

October Term, 1994

BRETT C. KIMBERLIN,

Petitioner,

vs.

J. MICHAEL QUINLAN, et al.,

Respondents.

On Writ Of Certiorari To The
United States Court Of Appeals
For The District of Columbia Circuit

BRIEF AMICI CURIAE OF THE STATES OF HAWAII, ARKANSAS, CALIFORNIA, DELAWARE, IDAHO, INDIANA, KANSAS, KENTUCKY, MINNESOTA, MISSISSIPPI, MISSOURI, MONTANA, NEW HAMPSHIRE, NEW YORK, OHIO, OKLAHOMA, RHODE ISLAND, SOUTH DAKOTA, UTAH, VERMONT, VIRGINIA, AND WISCONSIN, THE COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS, AND THE VIRGIN ISLANDS IN SUPPORT OF RESPONDENTS

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The amici States enumerated above, by their respective Attorneys General, submit this brief in support of affirmance of the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the proceeding below on October 8, 1993.

INTEREST OF AMICI CURIAE

The amici States have a very significant interest in securing the critical protections provided by the doctrine of qualified immunity for *state* governments and their officials, by the imposition of a heightened pleading standard in improper motive cases. Without a heightened pleading standard to eliminate baseless cases early, states will be forced needlessly to assume the costly and disruptive burdens of discovery and trial, simply to defend necessary official actions from frivolous charges.

SUMMARY OF ARGUMENT

The critical protections provided by the doctrine of qualified immunity, recognized in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), and consistently respected in following cases, would be effectively eviscerated by allowing plaintiffs to force state officials to assume the tremendous burden and expense of discovery and trial, in baseless cases, simply by making conclusory assertions of improper motive. The "heightened pleading standard" applied in this case respects the interests protected by qualified immunity by requiring plaintiffs to plead (at the motion to dismiss stage), or put forth evidence of (at the summary judgment stage), *specific nonconclusory* facts establishing the improper motive.

Significantly, application of a heightened pleading standard would not eliminate, to any significant degree, meritorious suits, because 1) plaintiffs unable to meet the standard would be unlikely to have a valid case to begin with, and should not be allowed to go on a "fishing

expedition," 2) plaintiffs, without engaging in direct discovery of governmental officials, have adequate alternative means of developing their case to meet the standard, and 3) where a defendant is able to avoid yielding extrinsic evidence of improper motive, it is unlikely that even direct discovery of that defendant would produce any incriminating evidence, either.

Indeed, a "heightened pleading standard," at the summary judgment stage, is nothing more than an application of this Court's requirement that parties seeking to avoid summary judgment set forth "specific facts," not "conclusory allegations," to sustain the complaint. *Lujan v. National Wildlife Fed'n*, 497 U.S. 871, 888-89 (1990). The heightened pleading standard has received virtually unanimous support among the federal circuits and has been endorsed by several members of this Court, and, contrary to petitioner's assertions, is not foreclosed by any of this Court's prior decisions or the Federal Rules.

Furthermore, in order to fully protect the amici States' *Harlow* interests, plaintiffs must be required to come forward with direct, as opposed to merely circumstantial, evidence of improper motive, or, at the very least, come forward with *very strong or substantial* specific factual evidence, whether "direct" or "circumstantial," to justify subjecting government officials to the burdens of discovery and/or trial. To allow plaintiffs to proceed based upon anything less than strong circumstantial (or direct) evidence of improper motive would significantly weaken the necessary protections provided by qualified immunity.

ARGUMENT

I. A Heightened Pleading Standard is Necessary to Protect Qualified Immunity in All Improper Motive Cases Against Government Officials.

This Court in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), wisely recognized the huge costs of subjecting government officials to the risks of trial, including "distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from pubic service," 457 U.S. at 816. The Court further concluded that even before trial, burdens imposed by *discovery* into "subjective motivation" could be "peculiarly disruptive of effective government." 457 U.S. at 817. This Court has demonstrated such a strong commitment to avoiding these harms that it even created an "exception" to the "final decision rule" by authorizing interlocutory appeals from denials of summary judgment where qualified immunity is raised, emphasizing that qualified immunity "is an *immunity from suit* [i.e. "trial" and "the other burdens of litigation"] rather than a mere defense to liability." *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985); *see also Anderson v. Creighton*, 483 U.S. 635, 646 n.6 (1987) (*Harlow* immunity is designed to protect officials from "broad-ranging discovery").

In short, this Court in *Harlow* and its progeny has struck a fine balance between the interests of effective government and the interests of plaintiffs seeking vindication of their constitutional or statutory rights by setting forth a qualified immunity standard that shields government officials from discovery as well as trial when

their conduct does not "violate clearly established statutory or constitutional rights of which a reasonable person would have known," 457 U.S. at 818. Since *Harlow*, the Court has developed the qualified immunity defense to the point where it "provides ample support to all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986).

Following this Court's qualified immunity decisions, several courts of appeals, including the lower court in this case, have adopted standards of pleading in improper motive actions against government officials that require plaintiffs to "plead[ ] specific . . . evidence of intent to defeat a motion to dismiss and [to produce] such evidence to defeat a motion for summary judgment." *Kimberlin v. Quinlan*, 6 F.3d 789, 793-94 (D.C. Cir. 1993).

Petitioner's contention that such requirements are impermissible would, if adopted by this Court, effectively eliminate the doctrine of qualified immunity in improper motive cases, thereby bringing about the very harms this Court has consistently sought to avoid. A plaintiff with an absolutely meritless case, in which there is no evidence at all to support plaintiff's claim that the government official acted with an improper motive, would be able to survive dismissal or summary judgment by the simple expedient of alleging in his or her complaint, or stating in an affidavit, the wholly conclusory assertion that the defendant official acted with the improper motivation, without providing any specific facts that would support that speculative assertion. Indeed, the plaintiff could make such groundless assertions without technically violating Rule 11 or committing perjury, as the

state of a third party's mind is ultimately unknowable except by inference.

Thus, it is clear that without a heightened pleading standard plaintiffs in improper motive cases would almost always be able to impose the heavy discovery and trial harms this Court struggled to avoid, even in entirely meritless cases. Only by imposing a standard of pleading that forces the plaintiff in such improper motive cases to, at the very least, allege, or put forth evidence of, *specific nonconclusory facts demonstrating improper motive* can this Court restore the balance this Court has consistently sought to maintain. If qualified immunity is to have any force at all in improper motive cases, this heightened pleading standard is an absolute necessity.

Importantly, imposition of the heightened pleading standard would not, to any significant degree, eliminate meritorious suits. First, any plaintiff who cannot come forward with specific non-conclusory allegations or evidence of improper motive likely does not have a meritorious case anyway. To allow plaintiff to burden governmental defendants with discovery under those circumstances is to sanction a purely speculative "fishing expedition" that Courts have always condemned. *See, e.g., Sawyer v. County of Creek*, 908 F.2d 663, 668 (10th Cir. 1990) (citing *Mitchell v. Forsyth*, 472 U.S. at 526) ("A federal lawsuit [can]not [be] a fishing expedition [or else] we would defeat the rationale for the qualified immunity defense."); *Lewis v. City of Ft. Collins*, 903 F.2d 752, 759 (10th Cir. 1990) ("Rule 56(f) is not a license for a fishing expedition, especially when summary judgment is urged based on a claim of qualified immunity."); *Kompare v. Stein*, 801 F.2d 883, 889 (7th Cir. 1986) (citing *Mitchell*,

supra) (same); *Geter v. Fortenberry*, 849 F.2d 1550, 1557 (5th Cir. 1988) (same); *Martin v. Malhoyt*, 830 F.2d 237, 257 (D.C. Cir. 1987) (same).

Furthermore, even if a plaintiff is not allowed to engage in direct discovery of government officials until after he or she has overcome the heightened pleading standard, a plaintiff can meet that standard by investigating all other matters, including non-governmental witnesses, that can lead to evidence of improper motive. In addition, because governmental agencies, both federal and state, are subject to comprehensive public records disclosure laws, *see, e.g.*, Freedom of Information Act, 5 U.S.C. § 552 (1988), and equivalent state laws,[1] plaintiffs already have an effective means of inquiring into governmental officials' actions, statements, and motives not available where private defendants are involved. Finally, if a governmental official is so adept at hiding his or her improper motive so as to leave no extrinsic evidence of that motive, it is highly unlikely that direct discovery of that same official will bring out any critical admissions, or other smoking gun, either. For these reasons, therefore, a heightened pleading standard is unlikely to eliminate, to any significant degree, truly meritorious suits.

Moreover, this so-called "heightened pleading standard" is really not a novel invention but simply a recognition of the especial force this Court's holding in *Lujan v. National Wildlike Fed'n*, 497 U.S. 871, 888 (1990), has where

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[1] *See* state statutes cited in Roang, *Toward a More Open and Accountable Government: A Call for Optimal Disclosure under the Wisconsin Open Records Law*, 1994 Wis. L. Rev. 719, 727-28 n. 42 (1994).

qualified immunity concerns are involved. This Court in *Lujan* has already required that in *all* cases, not just qualified immunity cases, parties wishing to avoid summary judgment may not rest upon an "affidavit containing *general* allegation[s] of injury" but instead must aver "requisite *specific* facts." 497 U.S. at 889. As this Court rightly recognized, the purpose of Rule 56 was "not to replace conclusory allegations of the complaint . . . with conclusory allegations of an affidavit" at summary judgment. 497 U.S. at 888. To reject a heightened pleading standard in cases like the one at bar would allow plaintiff to go forward simply by making conclusory averments in an affidavit of improper motive, in direct violation of *Lujan*. Given that this is a qualified immunity case with the additional attendant goals of avoiding the heavy burdens imposed on government by discovery and trial, the *Lujan* doctrine becomes all the more compelling and virtually dictates the so-called "heightened pleading standard," at least at the summary judgment stage.

That a heightened pleading standard is appropriate is made all the clearer by the fact that virtually every circuit that has considered the issue has chosen to adopt a heightened pleading standard. *See, e.g., Dunbar Corp. v. Lindsey*, 905 F.2d 754, 763-64 (4th Cir. 1990); *Jackson v. City of Beaumont Police Dep't*, 958 F.2d 616, 620 (5th Cir. 1992); *Chapman v. City of Detroit*, 808 F.2d 459, 465 (6th Cir. 1986); *Elliott v. Thomas*, 937 F.2d 338, 344-45 (7th Cir. 1991), *cert. denied*, 112 S. Ct. 973, 1242 (1992); *Brown v. Frey*, 889 F.2d 159, 170 (8th Cir. 1989), *cert. denied*, 493 U.S. 1088 (1990); *Branch v. Tunnell*, 937 F.2d 1382, 1386-87 (9th Cir. 1991); *Pueblo Neighborhood Health Ctrs, Inc. v. Losavio*, 847 F.2d

642, 649-50 (10th Cir. 1988); *Oladeinde v. City of Birmingham*, 963 F.2d 1481, 1485 (11th Cir. 1992), *cert. denied*, 113 S. Ct. 1586 (1993); *Hobson v. Wilson*, 737 F.2d 1, 29 (D.C. Cir. 1984).

Not only does this consensus among the federal courts of appeals plainly suggest the wisdom of adopting a heightened pleading standard, *see United States v. McNinch*, 356 U.S. 595, 599-600 (1958) (attaching weight to consensus view among circuits), but it also counsels against overturning a relatively long-standing practice that apparently has been so workable and appropriate that it continues to receive the support of the many and varied courts of appeals. *Cf. Perry v. Louisiana*, *cert. denied*, 461 U.S. 961, 962-63 (1983) (opinion of Stevens, J., joined by Blackmun & Powell, JJ.) (supporting notion of allowing other courts to first "serve as laboratories" before Supreme Court decides important procedural questions).

Indeed, at least five current or former members of this very Court have expressly supported a heightened pleading standard in cases like the one at bar. *See Siegert v. Gilley*, 500 U.S. 226, 235-36 (1991) (Kennedy, J., concurring in the judgment); 500 U.S. at 246 (Marshall, Blackmun, & Stevens, JJ., dissenting) (requiring plaintiff, as a prerequisite to any discovery, to put forth more than "bare conclusory allegations of unconstitutional purpose"); *Martin v. D.C. Metropolitan Police Dep't*, 812 F.2d 1425, 1435 (D.C. Cir. 1987) (opinion of Ginsburg, R.B., J.).

Finally, this Court is certainly not bound by any of its past decisions, including *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 113 S. Ct. 1160 (1993), to reject a heightened pleading standard. Indeed,

this Court in *Leatherman*, while rejecting a heightened pleading standard for claims alleging *municipal* liability, expressly distinguished, and reserved, the question of "whether our qualified immunity jurisprudence would require a heightened pleading in cases involving individual government officials." 113 S. Ct. at 1162. Indeed, Courts since *Leatherman* have continued to apply a heightened pleading standard. *See* cases cited in United States' Brief at 26 n.27.[2] *Leatherman*, therefore, is plainly not controlling.

In any event, the logic and reasoning of *Leatherman* simply do not apply to cases where the qualified immunity of individual government officials is at stake. The principal underpinning of this Court's ruling in *Leatherman* was its rejection of the municipality's claim that a heightened pleading standard should apply in order to avoid subjecting "municipalities to expensive and time consuming discovery in every § 1983 case, eviscerating their *immunity from suit* and disrupting municipal functions." 113 S. Ct. at 1162. Once this Court noted that municipalities do *not* enjoy any such immunity, *see id.*, the municipality's theory naturally crumbled. Because, on the contrary, the individual governmental officials in the case at bar *do* enjoy qualified immunity, not imposing a heightened pleading standard would indeed, as discussed above, "eviscerat[e] their immunity from suit and disrupt [government] functions." *Id.*

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[2] *See also Schultea v. Wood*, No. 93-2186 (5th Cir. March 9, 1995) (en banc), where the entire en banc panel upheld a heightened pleading standard, albeit in different forms, even after *Leatherman*.

Second, although petitioner argues that the language of Rules 8(a)(2) & 9(b), Fed.R.Civ.P., and the doctrine of *expressio unius est exclusio alterius* do not allow a heightened pleading standard, the overriding rule of statutory construction is that even the plain language of rules or statutes must not be followed where it would lead to an absurd result. *See United States v. Brown*, 333 U.S. 18, 27 (1948); *United States v. American Trucking Ass'ns*, 310 U.S. 534, 543 (1940). Because the fundamental goals promoted by the qualified immunity doctrine would be defeated if plaintiffs could evade motions to dismiss and impose huge discovery burdens upon governmental officials by simply pleading conclusory allegations of improper motive, Rules 8(a)(2) & 9(b) cannot be read to bar a heightened pleading standard.[3]

Even if this Court were to adopt the rigid reading of Rules 8(a)(2) & 9(b) that petitioner proposes, and reject a heightened pleading standard for *motions to dismiss*, at the very least this Court should impose a heightened pleading standard at the *summary judgment* stage, by requiring plaintiffs to adduce specific nonconclusory factual evidence showing improper motive.[4] For it is undisputed that Rules 8(a)(2) & 9(b) are inapplicable at the summary judgment stage. *See Kimberlin*, 6 F.3d at 794 n.9. Indeed, this Court in *Leatherman*, despite rejecting a heightened

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[3] As an alternative, the Fifth Circuit en banc majority in *Schultea* turned instead to Fed.R.Civ.P. *7(a)* to allow a heightened pleading standard to be imposed via a *reply* pleading.

[4] The term "heightened *pleading* standard" would actually be a misnomer because at the Rule 56 stage a court would be going beyond the pleadings to include consideration of the evidence. *See Kimberlin v. Quinlan*, 6 F.3d 789, 794 n.8.

pleading standard for municipalities at the dismissal stage, expressly encouraged application of a heightened standard at the summary judgment stage by advising the municipality and lower courts to "rely on summary judgment and control of discovery to weed out unmeritorious claims sooner rather than later." 113 S. Ct. at 1163.

II. Under the Heightened Pleading Standard, Plaintiffs Must Plead or Come Forward with Direct, as Opposed to Circumstantial, Evidence of Improper Motive, or, at the Very Least, Plead or Present Very Strong or Substantial Evidence of Improper Motive, whether Direct or Circumstantial, Before Being Allowed to Burden Governmental Officials with Discovery and/or Trial.

The Court below held that Kimberlin "was required to proffer *direct* evidence of unconstitutional motive . . . and was precluded from relying on mere circumstantial evidence." *Kimberlin*, 6 F.3d at 795. That holding was a reasonable one because requiring plaintiffs in improper motive cases to produce *direct*, as opposed to merely *circumstantial*, evidence of improper motive would further this Court's goal of protecting government from unnecessarily shouldering the heavy costs imposed by discovery and trial, where plaintiffs have no worthy claim. Circumstantial evidence, after all, encompasses a tremendously broad and virtually unlimited set of evidentiary facts. Because inferences supporting a particular position can be derived from almost any fact or set of facts, plaintiffs could come up with such evidence no matter how weak their case was. For example, in a case like the one at bar, Mr. Kimberlin could say that any *one*

of the following hypothetical "facts" provides circumstantial evidence of improper motive: 1) the mere "timing" fact that he was segregated shortly after he sought to publicize his accusations against Quayle, 2) that defendants were Quayle backers, and 3) that the motives given by defendants were plausible but not probable. Yet surely this Court would not want to allow such a case to go forward based upon even the cumulative effect of those three "facts."

Because a plaintiff with even the weakest case could almost always come up with some circumstantial evidence of improper motive, requiring the plaintiff to come forward with direct evidence of improper motive will provide the strongest protection for the *Harlow* goals. Justice Ginsburg, while a Circuit Judge, adopted such a requirement. *See Martin v. D.C. Metropolitan*, 812 F.2d at 1435.

However, because it must be conceded that there are practical and logical difficulties in drawing a strict line between direct and circumstantial evidence, *see Kimberlin*, 6 F.3d at 798 (Williams, J., concurring); 6 F.3d at 808-09 (Edwards, J., dissenting,) the amici States suggest a couple alternative formulations of the heightened pleading standard that will protect the *Harlow* interests while avoiding the necessity for distinguishing between direct and circumstantial evidence. Each of these alternatives centers instead upon the *strength* of the evidence, regardless of whether direct or circumstantial.[5] Under the first

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[5] After all, the distinction between direct and circumstantial evidence is ultimately only quantitative, rather than

proposed alternative standard, plaintiffs would be required to come forward with such compelling specific non-conclusory factual evidence of improper motive, whether direct or circumstantial, that if the evidence were accepted as true, any reasonable jury would have to find that defendants acted with the improper motive. This standard would protect the *Harlow* interests by weeding out all cases except those in which plaintiff can come forward with very strong evidence of improper motive. This formulation, apparently the United States' fallback position in the appeal below, *see Kimberlin*, 6 F.3d at 798 (Williams, J., concurring), would not only avoid the burdens of discovery and trial, but would discourage even the *filing* of lawsuits except where plaintiff has already in hand very strong evidence of improper motive.

A second and more moderate proposed alternative would require the plaintiff to come forward with strong specific non-conclusory factual evidence of improper

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qualitative, because all evidence simply falls upon a continuum from direct to circumstantial. For even the most quintessential example of *direct* evidence – the eyewitness account where, for example, B says "I saw A run the red light" – still requires numerous assumptions to be probative of whether A actually ran the red light. B must have good perception (here, eyesight), B must have good memory of the event, B must be able to convey his perception properly, and finally, B must be telling the truth. Thus, B's account can be seen as merely *circumstantial* evidence.

Thus, it may be more productive, and more defensible, to look to the strength or probative value of plaintiff's evidence – rather than its character as "direct" or "circumstantial" – in deciding whether government officials must be subjected to the heavy burdens of discovery and trial.

motive, whether direct or circumstantial, such that, if the evidence were accepted as true, the court, as factfinder, would find that it was more likely than not that defendants acted with the improper motive. This position, while not as stringent as the first, would serve the *Harlow* interests by forcing plaintiffs to come forward with evidence of improper motive that is strong enough to cause the judge to conclude that the defendants acted with improper motive. Indeed, if a plaintiff cannot produce at least enough evidence to convince the judge that the defendant acted with an improper motive, there is no good reason why plaintiff should be allowed to proceed further with his or her case.

Although it is true that allowing further discovery could theoretically yield evidence helpful to plaintiff's case, that is true in virtually all cases. The goals of qualified immunity would surely be defeated if plaintiffs could go on "fishing expeditions" to bolster cases that are too weak to convince a judge that the plaintiff actually has a case. Allowing a plaintiff severely to burden government officials with discovery simply because he or she has come up with *some* evidence, though not enough to convince a judge, that defendant acted with the improper motive, raises problems similar to those discussed earlier with respect to circumstantial evidence. It is just too easy for a plaintiff to come up with "some" evidence from which one can infer an actor's improper intent. A fair balance, therefore, between the goals protected by qualified immunity on the one hand, and vindication of a plaintiff's constitutional or statutory rights on the other, can be achieved by employment of this standard.

CONCLUSION

For the foregoing reasons, the amici States respectfully request that the decision of the United States Court of Appeals for the District of Columbia Circuit be affirmed. In order to avoid evisceration of the *Harlow* interests, at a very minimum, a heightened pleading standard requiring that plaintiff allege or prove specific nonconclusory facts establishing improper motive must be imposed. And whether or not this Court ultimately requires that plaintiff put forth direct, rather than circumstantial, evidence of improper motive, it should at the very least require that plaintiff's evidence of improper motive rise to a certain level of substantiality – at a minimum, the evidence must lead the judge to conclude that the defendant acted with the improper motive – before governmental officials are subjected to the harms that attend discovery and trial.

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Respectfully submitted,

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